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11 UNITED STATES DISTRICT COURT
12 FOR THE DISTRICT OF NEW JERSEY
13

14 MAXLITE, INC., a New Jersey
15 Corporation, f/k/a SK AMERICA,
INC., d/b/a MAXLITE,

16 Plaintiff,

17 v.

18 ATG ELECTRONICS, INC.,
19 JAMES D. STEEDLY, SOPHIA C.
GALLEHER, and MATTHEW KIM,

20 Defendants.
21

Case No. 2:15-CV-01116-SDW-SCM
Judge: Hon. Susan D. Wigenton

DEFENDANT ATG ELECTRONICS,
INC.'S OPPOSITION TO
DEFENDANTS JAMES D. STEEDLY,
SOPHIA C. GALLEHER, AND
MATTHEW KIM'S APPLICATION FOR
AN ORDER TO SHOW CAUSE

Motion Day: November 23, 2015
(Tentative)

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1 I. INTRODUCTION

2 In their Application for “An Order to Show Cause Seeking Temporary Relief
3 Restraining ATG From Discontinuing The Funding Of The Employee Defendants’
4 Legal Fees and Costs Pending A Hearing On The Summary Proceeding As
5 Required By The New Jersey Supreme Court In Re Grand Jury Opinion”
6 (“Application”),¹ individual defendants James D. Steedly (“Steedly”), Sophia C.
7 Galleher (“Galleher”), and Matthew Kim (“Kim”) (collectively, “Individual
8 Defendants”) rely entirely on a single New Jersey Supreme Court opinion, *In re*
9 *State Grand Jury Investigation*, 200 N.J. 481 (2009) (“*Grand Jury*”). While the
10 Individual Defendants state, rephrase, and repeat five sentences from Grand Jury
11 throughout their Application, the Individual Defendants fail to do anything more
12 than passively acknowledge and then ignore their Application’s fatal flaws.

13 First, the Court cannot grant the Individual Defendants’ request to enjoin
14 ATG because it does not have personal jurisdiction over ATG. Indeed, for months
15 the Individual Defendants have argued that this Court should not exercise personal
16

17 ¹ The Individual Defendants seek to initiate a New Jersey summary action
18 through a proposed filing attached to their application captioned as a “Verified
19 Crossclaim.” A free-standing crossclaim is not a recognized pleading under the
20 Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 7(a) (“Only these pleadings
21 are allowed: (1) a complaint; (2) an answer to a complaint; (3) an answer to a
22 counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a
23 third-party complaint; (6) an answer to a third-party complaint; and (7) if the court
24 orders one, a reply to an answer.”); *Kennell v. Avis Budget Grp., Inc.*, No. WMN-
25 09-833, 2009 U.S. Dist. LEXIS 68898, at *12 (D. Md. Aug. 6, 2009) (“Defendants .
26 . . . correctly observe that a cross-claim is not one of the permissible pleadings listed
27 in Rule 7. Thus, all of the cross-claims in this action could be stricken on that
28 ground.” (internal citations omitted)).

Given that the Individual Defendants passingly mention Federal Rule of Civil
Procedure 15 in their memorandum of law, ATG assumes that the Individual
Defendants are seeking to amend their Answers (D.E. 69-71) to include crossclaims
in spite of the fact that they do not specify that they are seeking to amend any
pleadings. If that is the case, the Individual Defendants did not follow the
procedure for seeking unconsented amendment of pleadings as set forth in the
Court’s June 15 Scheduling Order. *See* D.E. 83 at 4, ¶ 12. Regardless, all of the
arguments herein demonstrate that the proposed amendments would be futile,
which is an appropriate basis for denying leave to amend under Rule 15. *United*
Van Lines, LLC v. Lohr Printing, Inc., No. 11-04761, 2013 U.S. Dist. LEXIS
11612, at *13-19 (D.N.J. Jan. 29, 2013).

1 jurisdiction over ATG or the Individual Defendants. Based in part on the
2 Individual Defendants' own declarations, this Court tentatively decided that ATG
3 lacks sufficient minimum contacts with the State of New Jersey. Nevertheless, the
4 Individual Defendants now argue in conclusory fashion that ATG's appearance in
5 this forum—an appearance that has been strictly limited to arguing it should not
6 have to appear in this forum—is enough for the Court exercise personal
7 jurisdiction. Simply stated, this argument has no legal support.

8 Second, the Court cannot grant the Individual Defendants' request to enjoin
9 ATG because *Grand Jury* is inapplicable to this dispute. Reading the five
10 sentences that the Individual Defendants regurgitate throughout their Application in
11 context with the rest of the *Grand Jury* opinion, that case was about specific
12 conditions an attorney must satisfy to accept payment from a third party payer
13 under the New Jersey Rules of Professional Conduct. Moreover, *Grand Jury*
14 establishes the elements for a special cause of action for breach of contract that a
15 third party beneficiary may bring as part of underlying litigation. This is a
16 substantive right, not a procedural right. As the Individual Defendants plainly
17 argue, "substantive issues in this litigation are governed by California law." As
18 such, the substantive rights the Court defines in *Grand Jury* are inapplicable to this
19 dispute.

20 Third, even ignoring these procedural problems, the facts alleged in and the
21 evidence attached to the Individual Defendants' filings demonstrate that they would
22 not prevail in a summary action under *Grand Jury*. To obtain a mandatory
23 preliminary injunction, an injunction that seeks to alter the status quo by
24 commanding an affirmative act, the requester must meet a high bar in showing a
25 probability of success on the merits. Further, to obtain leave to amend a pleading,
26 the amendment must not be futile. The undisputed facts show that ATG's
27 gratuitous payment of legal fees was connected with the Individual Defendants'
28 employment at ATG. Because the Individual Defendants no longer work at ATG,

1 the condition of payment is no longer satisfied. This is grounds to deny their
2 request for a preliminary mandatory injunction and deny leave to amend altogether.

3 In conclusion, there are at least three independent legal bases for why the
4 Individual Defendants' Application cannot succeed. As a result, ATG respectfully
5 requests that this Court deny the Individual Defendants' Application.

6 **II. FACTS**

7 The alleged facts on which the Individual Defendants have previously pled
8 and/or now base their Application are as follows.

9 **A. Relevant Factual Background Of ATG**

10 ATG is, and always has been, a California corporation with its principal
11 place of business and primary distribution center (*i.e.*, "ATG's Headquarters") in
12 Rancho Cucamonga, California. *See* D.E. 17-1 at 8. ATG does not have, and never
13 has had, any (1) office or other place of business in New Jersey, (2) employees
14 located in New Jersey, (3) contractual or other business relationships with
15 companies located in New Jersey, (4) licenses to do business in New Jersey, (5)
16 advertising or marketing efforts directed at New Jersey, or (6) ownership or
17 affiliation with any facilities located in New Jersey. *Id.* at 9. The only remote
18 connection that ATG has to New Jersey is that some of ATG's third party
19 distributors do business in New Jersey but those distributors are not controlled by
20 ATG and their sales account for well under one percent (1%) of ATG's total
21 product sales. *Id.* at 9. Yaxi Ni ("Ni") is the Chairman and President of ATG.

22 **B. Relevant Factual Background On Steedly**

23 Steedly currently resides in Menifee, California. *See* D.E. 17-1 at 10. On
24 September 25, 2009, and while living in California, MaxLite hired Steedly to serve
25 as its Director of Engineering. *Id.* In or around this date, Steedly entered into a
26 Proprietary Information Agreement with MaxLite (the "Steedly PIA"). *See* D.E. 1-
27 3 at 50. Steedly began his employment with MaxLite in New Jersey but moved
28 back to California. *See* D.E. 17-1 at 10. Steedly worked out of his garage in

1 Menifee, California and out of MaxLite's West Coast office for the last three years
2 of his employment. *Id.*

3 In or around March 2013, ATG solicited Steedly and another MaxLite
4 employee, David Wyatt ("Wyatt") to work for ATG. *See* D.E. 109-4 at 8, ¶ 14.
5 During ATG's solicitation of Steedly and Wyatt, they expressed concerns with their
6 respective Proprietary Information Agreements' non-compete provisions. *Id.* at 9, ¶
7 15. ATG paid for an attorney to review Wyatt's Proprietary Information
8 Agreement ("Wyatt PIA"). *Id.* Thereafter, ATG allegedly informed Steedly that
9 the Steedly PIA would be difficult to enforce. *Id.* A year later, ATG reinitiated its
10 efforts to solicit Steedly. *Id.* at 9, ¶ 16. During one of his meetings with ATG,
11 Steedly alleges that ATG orally assured him that ATG would fully protect him in
12 any dispute with MaxLite. *Id.* at 10, ¶ 18. On or about October 10, 2014, Steedly
13 accepted ATG's written employment offer. *Id.* at 10, ¶ 19. The employment offer
14 does not include an obligation by ATG to defend or hold Steedly harmless in
15 litigation with MaxLite. *Id.* at Exh. 6.

16 **C. Relevant Factual Background On Kim**

17 Kim is, and at all relevant times has been, a resident of Atlanta, Georgia. *Id.*
18 On July 5, 2013, while living in Atlanta, MaxLite hired Kim to serve as its National
19 Project Sales Manager. *Id.* In or around this date, Kim entered into a Proprietary
20 Information Agreement with MaxLite (the "Kim PIA"). *See* D.E. 1-3 at 68.
21 During Kim's employment with MaxLite, Kim never worked out of MaxLite's
22 New Jersey Office. *See* D.E. 17-1 at 9. Rather, Kim spent the majority of his time
23 either traveling across the county meeting with clients or working remotely from
24 his home in Atlanta, Georgia. *Id.*

25 In or around November 2014, ATG solicited Kim to work for ATG. *See*
26 D.E. 109-4 at 11-12, ¶ 25. During one of his meetings with ATG, Kim alleges he
27 expressed concerns with the Kim PIA's non-compete provisions. *Id.* at 12, ¶ 25.
28 Ni allegedly informed Kim that the Kim PIA was "not a concern" but that in the

1 event there was any litigation with MaxLite, ATG would protect him and cover all
 2 defense costs. *Id.* On or about January 5, 2014, Kim accepted ATG's written
 3 employment offer. *Id.* at 12 ¶ 27. The employment offer does not include an
 4 obligation by ATG to defend or hold Kim harmless in litigation with MaxLite. *Id.*
 5 at Exh. 8.

6 **D. Relevant Factual Background On Galleher**

7 Galleher currently resides in Long Beach, California. *See* D.E. 17-1 at 11.
 8 On May 22, 2012, MaxLite hired Galleher to serve as its Business Development
 9 Analyst. In or around this date, Galleher entered into a Proprietary Information
 10 Agreement with MaxLite (the "Galleher PIA"). *See* D.E. 1-3 at 11. Galleher began
 11 her employment with MaxLite in New Jersey. *See* D.E. 17-1 at 11. In or around
 12 July 2014, MaxLite promoted Galleher to the position of Management Associate
 13 and transferred her to its West Coast office in Rancho Cucamonga, California. *Id.*
 14 Galleher has not returned to New Jersey since leaving in July 2014. *Id.*

15 In or around October 2014, ATG solicited Galleher to work for ATG. *See*
 16 D.E. 109-4 at 11, ¶ 22. During one of her meetings with ATG, Galleher alleges she
 17 expressed concerns with the Galleher PIA's non-compete provisions. *Id.* at 11, ¶
 18 23. Ni allegedly informed Galleher that the Galleher PIA was unenforceable but
 19 that ATG would cover and defend her in the event of a legal dispute with MaxLite.
 20 *Id.* On or about October 30, 2014, Galleher accepted ATG's written employment
 21 offer. *Id.* at 11, ¶ 22. The employment offer does not include an obligation by
 22 ATG to defend or hold Galleher harmless in litigation with MaxLite. *Id.* at Exh. 7.

23 **E. The MaxLite Litigation**

24 On or about February 9, 2015, the Individual Defendants received "Cease
 25 and Desist" letters from MaxLite requesting that they terminate their positions with
 26 ATG by February 12, 2015. *See* D.E. 109-4 at 13, ¶ 29. Galleher contacted an
 27 attorney she knew, Jim Mulcahy ("Mulcahy"), to review the letters and obtain a
 28 recommendation for how to respond. *Id.* at 13, ¶ 30. The Individual Defendants,

1 and not Ni, consulted with Mulcahy. *Id.* at 13, ¶ 31. Mulcahy recommended that
2 they file a lawsuit in California. *Id.* at 13, ¶ 31.

3 Not long thereafter, Galleher spoke by telephone with Ni about Mulcahy's
4 recommendation and Ni allegedly stated that ATG would gratuitously pay for the
5 lawsuit. *Id.* at 14, ¶ 32. On or about February 12, 2015, Ni and the Individual
6 Defendants allegedly received an engagement agreement and conflict waiver from
7 Mulcahy. *Id.* at 14, ¶ 33. Relevant here, the engagement agreement states that the
8 scope of services was "the filing of a lawsuit against MaxLite, Inc.", it does not
9 state or even infer that ATG would be solely responsible for the payment of
10 Mulcahy's attorneys' fees, it states that the laws of the State of California govern
11 the engagement agreement, and it selects a venue in California for disputes. *Id.* at
12 74-79, Exh. 12.

13 On February 13, 2015, Mulcahy filed a Complaint for Declaratory and
14 Injunctive Relief in the Superior Court of the State of California for the County of
15 Orange, naming as the plaintiffs ATG and the Individual Defendants. *Id.* at 15, ¶
16 34. However, ATG and the Individual Defendants learned on February 17, 2015,
17 that MaxLite had filed the Complaint initiating this matter on February 12, 2015.
18 *Id.* at 15, ¶ 35. When this occurred, Ni allegedly orally informed the Individual
19 Defendants that he would still pay for their attorneys' fees and that they should
20 focus on their work. *Id.* at 15-16, ¶¶ 36-38. On February 19, 2015, Ni emailed the
21 Individual Defendants again asking them "not to worry about this lawsuit thing",
22 that "Mulcahy will have this handled for us", and that "we should not be distracted
23 from what we do." *Id.* at 16, ¶ 39.

24 From February 2015 through June 2015, ATG and the Individual Defendants
25 argued jointly that this Court should not exercise personal jurisdiction over
26 MaxLite's lawsuit. Indeed on March 12, 2015, ATG and the Individual Defendants
27 filed a joint Motion to Dismiss MaxLite's Complaint for lack of personal
28 jurisdiction accompanied by declarations of all of the Individual Defendants. D.E.

1 17-1. Thereafter, Ni allegedly kept reiterating to the Individual Defendants that
2 they should focus on their work and not the legal fees. *Id.* at 17-21. However, the
3 legal fees were quickly escalating beyond ATG's or the Individual Defendants'
4 expectations. Indeed, on April 21, 2015, Ni asked Galleher why Mulcahy's bill
5 was over \$70,000. *Id.* at 18, ¶ 48. On May 10, 2015, Ni did state to Galleher that
6 "as long as you guys are productive, the lawsuit is nothing, we will fight it," but Ni
7 again reiterated his concern that Mulcahy's "bill is bigger than we expected and it is
8 becoming [sic] a substantial investment on ATG's part, we need to evaluate [sic]
9 our options before we go on." *Id.* at 19, ¶ 52.

10 After substantial arguments and costs, the Court entered an order on April 29,
11 2015, that found that it could exercise personal jurisdiction over the Individual
12 Defendants but that MaxLite "has not presented sufficient evidence to meet its
13 burden of showing that Defendant ATG has contacts with the State of New Jersey
14 sufficient for this Court to exercise *in personam* jurisdiction over ATG." D.E. 63.
15 On June 15, 2015, the Court entered two different scheduling orders: (1) an Initial
16 Scheduling Order allowing for MaxLite's case against the Individual Defendants to
17 proceed (D.E. 83), and (2) a Scheduling Order for Jurisdictional Discovery
18 allowing for MaxLite and ATG to conduct limited discovery solely limited to the
19 question of whether the Court had personal jurisdiction over ATG (D.E. 84). As
20 such, what was once a costly but unified argument on behalf of ATG and the
21 Individual Defendants had become essentially two different cases that ATG must
22 defend.

23 On June 18 and 19, 2015, Ni terminated the Individual Defendants. D.E.
24 109-4 at 21, ¶ 58. The Individual Defendants allege that Ni stated that the litigation
25 "had become too expensive and had prevented ATG from receiving approval for a
26 credit increase, and the litigation had become a concern for ATG's investors and
27 that, therefore, ATG was terminating them all, effective June 19, 2015." D.E. 109-
28 4 at 21, ¶ 58. Ni allegedly orally informed the Individual Defendants that while

ATG would not pay any more attorneys' fees, he would personally pay the outstanding fees and costs to Mulcahy and would "support the Employee Defendants and find a way to work together again after the litigation had been resolved." *Id.* at 22, ¶ 59. Thereafter, the Individual Defendants were each presented with a Severance Agreement that included financial considerations. *Id.* at 24, ¶ 65. The Individual Defendants have all declined the Severance Agreement. Not long thereafter, Brody and Associates and Best Best & Krieger LLP sought to substitute in as counsel for ATG. D.E. 89, 100, 101. Mulcahy and his local counsel, Shari Amster, have since unsuccessfully sought to withdraw as counsel three times. *See* D.E. 97-99, 102-06.

III. ARGUMENT

A. The Individual Defendants' Request That The Court Exercise Control Over ATG Is Improper Because The Court Lacks Personal Jurisdiction Over ATG

A court must have personal jurisdiction over a party for it to have the power to exercise control over that party. *See Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). A finding of personal jurisdiction is proper only where the party "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998) (internal citations omitted); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal citations and quotation marks omitted). However, a party's appearance in a forum state to defend itself in litigation does not qualify as purposefully availing itself of the privilege of conducting activities in the forum state. *See O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 322 (3d Cir. 2007) (stating that a party subjects itself to personal jurisdiction in a forum in "exchange" for "the benefits and protection received from the forum"); *Rozenblat v. Sandia Corp.*, No. 05-1556, 2006 U.S. App. LEXIS 6804, at *9 (Fed. Cir. Mar. 17, 2006) ("Mr. Rozenblat argued before

1 the district court that personal jurisdiction was established because the parties
2 appeared in that court in another action . . . ; however, the district court correctly
3 observed that prior appearance did not necessarily waive the personal jurisdiction
4 requirement in future actions, nor constitute related business conduct within the
5 jurisdiction.”); *AstraZeneca Pharm. LP v. Mylan Pharm., Inc.*, No. MDL-08-1949-
6 JJF, 2010 U.S. Dist. LEXIS 14935, at *10 (D. Del. Feb. 19, 2010) (“Further, the
7 Court is not persuaded that Apotex’s participation, primarily as a defendant, in
8 litigation in this District is sufficient to support the exercise of general
9 jurisdiction.”). This is especially true where that party’s appearance is limited to its
10 argument that the court should dismiss the party for lack of personal jurisdiction.
11 *See City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 139 (2d Cir.
12 2011) (stating that “when a defendant appears and challenges jurisdiction,” a court
13 interprets the appearance only as the party’s “agree[ment] to be bound by the
14 court’s determination on the jurisdictional issue”).

15 Up until the Individual Defendants’ Application, ATG’s appearance in this
16 Court has been limited to its argument that the Court should dismiss the claims
17 against ATG for lack of personal jurisdiction. Indeed, both ATG and the Individual
18 Defendants jointly argued that this Court does not have personal jurisdiction over
19 them. D.E. 17. To effectuate this argument, the Individual Defendants submitted
20 declarations that demonstrate ATG did not contract with, meet with, or even
21 communicate with the Individual Defendants while they were in New Jersey
22 because the Individual Defendants did not live in or work out of New Jersey. *Id.*
23 Based on ATG’s and the Individual Defendants’ arguments, this Court tentatively
24 found that it lacks personal jurisdiction over ATG. D.E. 56.

25 Now, contradicting their prior arguments, the Individual Defendants request
26 that the Court exercise personal jurisdiction over ATG, restrain its actions, and
27 force it to pay for the Individual Defendants’ attorneys’ fees. The Individual
28

1 Defendants' entire argument that this Court has personal jurisdiction over ATG is
2 as follows:

3 This Court has held in abeyance a ruling on whether it has
4 personal jurisdiction over Defendant ATG pending
5 jurisdictional discovery for purposes of adjudicating the
6 underlying claims brought by Plaintiff MaxLite.
7 However, for purposes of this application by way of
8 Order to Show Cause, the basis for personal jurisdiction
9 over ATG is clear. The Court has specific personal
10 jurisdiction over ATG because ATG knowingly agreed to
11 fund a litigation in the New Jersey District Court, actually
12 did fund several months of that litigation in New Jersey,
13 and now has violated New Jersey ethical rules by
14 reneging on its promise without obtaining the Court's
15 permission. ATG's conduct in unilaterally halting the
16 payment of attorneys' fees on behalf of the Employee
17 Defendants directly interferes with a New Jersey litigation
18 and threatens to cause counsel to violate its New Jersey
19 ethical obligations. The harm caused is felt by the
20 Employee Defendants, who ATG knows are litigants in a
21 New Jersey District Court. D.E. 109-4 at 3, ¶ 9

22 Said another way, the Individual Defendants reiterate that the Court may not have
23 personal jurisdiction over ATG for the underlying lawsuit but, because ATG
24 specially appeared in this Court and knowingly paid for ATG's and the Individual
25 Defendants' joint arguments that the Court lacks personal jurisdiction, ATG's
26 alleged breach of an agreement that was entered into in forums outside of New
27 Jersey merits this Court's exercise of personal jurisdiction. Contrary to the
28 Individual Defendants' argument, these facts refute, not support, their plea that the
Court exercise personal jurisdiction.

First, it is illogical for the Court to exercise personal jurisdiction over the
Individual Defendants' Application if the Court cannot exercise personal
jurisdiction for the underlying lawsuit. The only additional activity that ATG has
conducted in the State of New Jersey since this lawsuit's inception has been
litigating the jurisdictional issue in this Court. This activity does not qualify as a
"contact" with the State of New Jersey because appearing in court as a defendant
does not confer any benefit upon ATG.

1 Second, ATG's gratuitous payment of the Individual Defendants attorneys'
2 fees was limited to ATG's and the Individual Defendants' joint arguments that this
3 Court lacked personal jurisdiction over them. ATG made the bulk of its payments
4 to Mulcahy, \$40,000, in the month following the Court's ruling on ATG and the
5 Individual Defendants' motion to dismiss for Mulcahy's work in connection with
6 that motion. *See* D.E. 109-4, Exh. 27. Once the case moved beyond the Individual
7 Defendants' jurisdictional arguments, ATG only paid Mulcahy \$17,500 total before
8 ceasing payments. *Id.*

9 Third, the Individual Defendants acknowledge that the alleged agreement to
10 pay for their legal fees was entered into in forums outside of New Jersey for the
11 purpose of pursuing a lawsuit in the State of California. *See* D.E. 109-4, Exh. A at
12 11, ¶ 33. Under these circumstances, courts do not exercise personal jurisdiction.
13 For instance, in *Regional Employers' Assurance Leagues Voluntary Employees v.*
14 *O'Brien*, No. 12-2207, 2013 U.S. Dist. LEXIS 162768 (E.D. Pa. Nov. 14, 2013),
15 the court declined to exercise personal jurisdiction over a defendant in a contract
16 dispute when the defendant entered into a contract outside of the forum state. *Id.* at
17 *17-29. The court found determinative that the defendant did not deliberately reach
18 out to the forum state to form the contract and nothing in the contract indicated a
19 connection to the forum state. *Id.* at *21-24. As such, the court compared the
20 defendant to a "passive buyer," over which the Third Circuit has found no personal
21 jurisdiction. *Id.* at *21-24 (citing *Vetrotex Certainteed Corp. v. Consolidated Fiber*
22 *Glass Prods. Co.*, 75 F.3d 147 (3d Cir. 1996)).

23 As another example, in *Abbot Laboratories v. Biovalve Technologies,*
24 *Incorporated*, 543 F. Supp. 2d 913 (N.D. Ill. 2008), the court declined to exercise
25 personal jurisdiction over a defendant in a contract dispute when the defendant had
26 no reason to believe that part of the contract involved the other side's performance
27 in the forum state. The court noted that the defendant was not subject to personal
28 jurisdiction in the forum state merely because part of the contract performance

1 occurred in the forum state. *Id.* at 920. Even though the defendant later became
2 aware that part of the performance occurred in the forum state, the court only
3 deemed relevant whether the defendant knew at the time of the agreement that part
4 of the performance would involve work in the forum state. *Id.*

5 The Individual Defendants' allegations mirror the circumstances presented in
6 the cases above. Like *Regional Employers'*, the Individual Defendants allege that
7 ATG entered into the alleged agreement outside of the State of New Jersey. *See*
8 D.E. 109-4, Exh. A at 11, ¶ 33. Like *Regional Employers'*, the intention of the
9 alleged agreement was not to reach out to the State of New Jersey but for the parties
10 to jointly file a complaint in the State of California. *Id.* Moreover, like *Regional*
11 *Employers'*, the California law firm's engagement agreement and conflict waiver
12 that the Individual Defendants rely upon not only fail to indicate any connection
13 with the State of New Jersey, but they specifically select the State of California's
14 venue, laws, and Rules of Professional Conduct for the parties' relationship. *See*
15 D.E. 109-4, Exhs. 12 & 13. Last, and like *Abbot*, the alleged agreement has only
16 inadvertently and partially involved "performance" in the State of New Jersey.

17 In sum, the Individual Defendants have not, and cannot, demonstrate that this
18 Court can exercise personal jurisdiction over ATG and, if anything, their
19 accusations support ATG's argument that it has never purposefully availed itself of
20 the privilege of conducting this lawsuit or any other activities in the State of New
21 Jersey. Consequently, the Court cannot exercise the personal jurisdiction over ATG
22 and, as a result, the Court cannot grant the Individual Defendants request to enjoin
23 ATG's actions.

B. Even If The Court Could Exercise Personal Jurisdiction Over ATG, *In re State Grand Jury Investigation* Is Inapplicable To This Dispute

1. The Individual Defendants Base Their Entire Application On Dictum From *In re State Grand Jury Investigation* That Relates To Specific Attorney Conduct That Is Not Relevant Here

The Individual Defendants base their entire Application on a single New Jersey Supreme Court case, *In re State Grand Jury Investigation*, 200 N.J. 481 (2009) (“*Grand Jury*”). Indeed, the Individual Defendants base their Application on five, non-determinative sentences within *Grand Jury*. While the Individual Defendants state and rephrase these sentences repeatedly in their Application, this dictum is inapplicable here because, in context, these sentences only relate to specific, irrelevant attorney conduct.

Grand Jury concerned a state grand jury investigation into alleged criminal activity of a company and three of its employees. *Id.* at 486. That company hired three separate attorneys to represent the target employees and one additional attorney to represent all non-target employees during the investigation. *Id.* The State, not the Company, moved to disqualify the employees’ attorneys based on a conflict of interest. *Id.* at 488. The trial court denied the State’s motion and allowed the Company to continue paying for the employees defense of this criminal investigation. *Id.* at 488. On appeal, the New Jersey Supreme Court affirmed the trial court’s denial of the State’s motion to disqualify. *Id.* at 499. As part of its opinion, the New Jersey Supreme Court set forth six conditions that an attorney must satisfy before the attorney may accept payment from a third-party payer under the New Jersey Rules of Professional Conduct (“NJRPC”). *Id.* at 495-97. The sixth condition the New Jersey Supreme Court set forth was that an attorney cannot accept payment from a third-party payer unless the third party agrees to discontinue

1 funding only after obtaining leave of court. *Id.* at 499. Then, with even less of a
 2 relationship to the facts at issue, the New Jersey Supreme Court stated that “[i]f a
 3 third-party payer fails to pay an employee’s legal fees and expenses when due, the
 4 employee shall have the right, via a summary action, for an order to show cause
 5 why the third-party payer should not be ordered to pay those fees and expenses.”
 6 *Id.* at 497.

7 The above referenced passage is readily distinguishable from the present
 8 matter. The New Jersey Supreme Court based this passage on the NJRPC. *Id.* at
 9 491-97. Regardless of their jurisdiction, Rules of Professional Conduct govern
 10 attorneys’ behavior—not a payer’s or even a party receiving representation’s
 11 behavior. Similarly, while this Court has adopted the NJRPC, its adoption is
 12 limited to the Court’s “authority to supervise the professional conduct of an
 13 attorney appearing before it.” *See Celgene Corp. v. KV Pharm. Co.*, No. 07-4819-
 14 SDW, 2008 U.S. Dist. LEXIS 58735, at *6 (D.N.J. July 29, 2008) (emphasis
 15 added). Thus, it logically follows that this Court may only utilize the relevant
 16 passage of *Grand Jury* to regulate an attorney’s conduct by disqualifying that
 17 attorney or preventing him/her from accepting payment from a third-party payer if
 18 he/she does not satisfy each of those six conditions. Although of questionable
 19 value, this passage also provides that if an attorney secures an agreement from a
 20 third party payer to discontinue funding only after obtaining leave of court and the
 21 third party payer breaches that agreement with the attorney, then the beneficiary of
 22 the third party payer may have the right to pursue a summary action.

23 Here, ATG and the Individual Defendants explicitly agreed that their
 24 previous attorney’s conduct was governed by the California Rules of Professional
 25 Conduct and did not anticipate an action in New Jersey. As such, ATG’s and the
 26 Individual Defendants’ previous attorney did not satisfy the six conditions *Grand*
 27 *Jury* requires an attorney to satisfy before an attorney can accept payment from a
 28 third-party payer under the NJRPC. Relevant here, ATG’s and the Individual

Defendants' previous attorney did not ask ATG to agree to discontinue funding only after obtaining leave of court. Because ATG did not agree to discontinue funding only after obtaining leave of court, the Individual Defendants do not have a right to a summary action to force ATG to resume paying for their attorneys' fees under *Grand Jury* and/or the NJRPC. Consequently, the Individual Defendants' reliance on *Grand Jury* in this dispute is misplaced and the Court should deny their Application.²

2. The Relevant Passage From *Grand Jury* Creates A Substantive Right That Is Inapplicable Here

As stated more fully above, the Individual Defendants have argued from the inception of this case that the Court lacks personal jurisdiction over the underlying lawsuit. *See* D.E. 17. Moreover, the Individual Defendants explicitly state in their Application that "[t]o be clear, by invoking New Jersey law in support of the relief sought in this Order to Show Cause, the Employee Defendants are in no way waiving their position that the substantive issues in this litigation are governed by California law." *See* D.E. 109-3 at 3 n.2. Nevertheless, the Individual Defendants attempt to characterize their claim that ATG breached an alleged oral agreement to pay for their attorneys' fees as a procedural question that requires the application of the NJRPC. *Id.* This attempt to transmute a substantive question of law into a procedural question is without merit.

The rights created by *Grand Jury* that the Individual Defendants request this Court to enforce are substantive.³ Substantive law is the law "which defines our

² Factually, there are several reasons why the relevant passages from *Grand Jury* are distinguishable from this matter including, but not limited to: (i) *Grand Jury* involved a criminal, not a civil, action, (ii) *Grand Jury* involved an opposing counsel, not the third party payer, who sought to disqualify counsel based on a conflict of interest, (iii) *Grand Jury* involved an employer who insisted upon, not refused to, pay for its former employees legal fees, and (iv) *Grand Jury* involved actions taken by the employees within the scope of their employment.

³ The cases that the Individual Defendants cite in support of the proposition that this dispute is a procedural question are inapplicable. Specifically, *Mitzel v. Westinghouse Elec. Corp.*, 72 F.3d 414 (3d Cir. 1995), and every other case

rights and duties,” while procedural law relates to “pleading and practice, through which such rights and duties are enforced in the courts.” *Winberry v. Salisbury*, 5 N.J. 240, 247-48 (1950). Moreover, where a court defines the elements that establish a right to relief, that right is substantive not procedural. *See Villot v. Varner*, 373 F.3d 327, 332-34 (3d Cir. 2004) (holding that a state statute was substantive rather than procedural because it “amended the definition of a . . . petitioner’s right to . . . relief by adding a new element”).

The relevant passage from *Grand Jury* essentially defines the elements of a special cause of action and the specific procedure for its enforcement. As stated above, *Grand Jury* provides six conditions that an attorney must satisfy before the attorney may accept payment from a third party payer under the NJRPC. *Grand Jury*, 200 N.J. at 495-97. The condition at issue here is that an attorney must obtain an agreement from a third party payer to discontinue funding only after obtaining leave of court. If the third party payer violates this agreement with the attorney, then the beneficiary of the third party payer may have the right to pursue a summary action as part of the underlying litigation to force the third party payer to continue paying for its attorneys’ fees. In sum, *Grand Jury* defines the elements and procedure of a special cause of action for breach of contract that can be brought by a third party beneficiary as part of the underlying litigation.

discussing New Jersey choice of law regarding attorneys’ fees focuses on whether New Jersey courts apply their own law to issues concerning attorneys’ fees after a party successfully resolves a substantive claim. *See Mitzel*, 72 F.3d at 416-18 (holding that “an application of New Jersey choice of law principles would mandate application of New Jersey law to” the amount of a contingency fee that a lawyer could recover after successfully settling substantive claims); *see also Chin v. Chrysler LLC*, 538 F.3d 272, 278-80 (3d Cir. 2008); *Elder v. Metro. Freight Carriers, Inc.*, 543 F.2d 513, 518-19 (3d Cir. 1976); *N. Bergen Rex Transp. v. Trailer Leasing Co.*, 158 N.J. 561, 568-70 (1999); *State v. Otis Elevator Co.*, 12 N.J. 1, 5-12 (1953); *Du-Wel Products, Inc. v. U.S. Fire Ins. Co.*, 236 N.J. Super. 349, 362-63 (App. Div. 1989). In contrast, the dispute here is not about attorneys’ fees *qua* attorneys’ fees; it is about an alleged breach of an agreement to pay for a party’s attorneys’ fees.

1 The totality of the Individual Defendants' Application only further
 2 demonstrates that they are seeking relief for an alleged breach of contract. The
 3 Individual Defendants ask the Court for leave to file a crossclaim where they assert
 4 a single cause of action for declaratory judgment against ATG. See D.E. 109-4,
 5 Exh. A at 26. The federal Declaratory Judgment Act, 28 U.S.C. § 2210, "does not
 6 create substantive rights for parties; it merely provides another procedure whereby
 7 parties may obtain judicial relief." *Washington v. Donley*, 802 F. Supp. 2d 539, 554
 8 (D. Del. 2011) (quoting *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384,
 9 1386 (10th Cir. 1978)). A claim for declaratory judgment therefore requires some
 10 underlying substantive right that the claimant seeks to vindicate. See *id.* Here, the
 11 Individual Defendants base their declaratory judgment action on an oral
 12 agreement⁴, an alleged breach of that agreement⁵, and damages that are a result of
 13 that alleged breach⁶—a cause of action akin to breach of oral contract. See *Stockton*
 14 *Mortgage, Inc. v. Tope*, 233 Cal. App. 4th 437, 453 (2014) ("The elements of a
 15 breach of oral contract claim are the same as those for a breach of written contract:
 16 a contract; its performance or excuse for nonperformance; breach; and damages.").

17 Under New Jersey choice-of-law principles, actions for a breach of contract
 18 are substantive questions of law that are typically governed by the law of (i) the
 19 state that the parties specifically select for the resolution of their dispute or (ii) the
 20 state in which the parties entered into their agreement. See *Gilbert Spruance Co. v.*
 21 *Pa. Manufacturers' Assoc. Ins. Co.*, 134 N.J. 96, 102-03 (1993); *Winer Motors, Inc.*
 22 *v. Jaguar Rover Triumph, Inc.*, 208 N.J. Super. 666, 671 (App. Div. 1986). Here,

23
 24 ⁴ See D.E. 109-4, Exh. A at 7, ¶ 18 ("Mr. Ni assured [Steadly] that . . . in any
 dispute with MaxLite, ATG would fully protect him "through to the end."); *id.* at 8,
 ¶ 23; *id.* at 8-9, ¶ 25.

25 ⁵ *Id.* at 22, ¶ 70 (" . . . Mr. Ni informed [Steadly and Galleher] that he would not
 26 send any money unless the Employee Defendants signed the Severance Agreements
 27 . . .").

27 ⁶ *Id.* at 26, ¶ 84 ("Absent the promised litigation funding from ATG, the Employee
 28 Defendants will be utterly defenseless against a multinational company with the
 resources and will to destroy their careers and[] force each one of them into
 bankruptcy.").

1 ATG's and the Individual Defendants' previous attorneys' engagement agreement
 2 and conflict waiver specifically select California as the law and venue for a dispute
 3 regarding those documents⁷, the Individual Defendants admit that the alleged oral
 4 agreement for ATG to pay for their attorneys' fees was entered into in California
 5 (or at the very least outside of New Jersey)⁸, and the Individual Defendants insist
 6 that California substantive law governs this case⁹. Thus, under New Jersey choice-
 7 of-law principles, California law governs the Individual Defendants' request for
 8 relief.

9 California law does not support the relief that the Individual Defendants
 10 request of this Court. One, California law does not have a substantive right like the
 11 one discussed in *Grand Jury*. Rather, a California employee is entitled to legal
 12 protection from his employer only if he was acting in the scope of his employment;
 13 even then, the California Labor Code imposes a duty to *indemnify* on the employer,
 14 not a duty to *defend*. *Nicholas Labs., LLC v. Chen*, 199 Cal. App. 4th 1240, 1247
 15 (2011); Cal. Lab. Code § 2802. Here, MaxLite's litigation is based on the
 16 Individual Defendants' alleged breach of a non-competition agreement with
 17 MaxLite—an alleged breach that was outside the scope of the Individual
 18 Defendants' employment with ATG. *See Medtronic, Inc. v. NuVasive, Inc.*, No.
 19 W2002-01642-COA-R3-CV, 2003 Tenn. App. LEXIS 590, at *24-25 (2003)
 20 (interpreting Section 2802 and stating that “NuVasive has presented no evidence
 21 that its employees had any work-related duty to file the lawsuit against [a prior
 22 employer] in California” to defeat a non-compete agreement). Two, purely
 23 gratuitous promises are unenforceable under California law. *Jara v. Supreme*
 24 *Meats*, 121 Cal. App. 4th 1238, 1249 (2004). Thus, even under the Individual
 25 Defendants' inaccurate facts, ATG's alleged promise to pay for the Individual
 26

27 ⁷ D.E. 109-4, Exh. 12 at ¶¶ 9-10.

28 ⁸ D.E. 109-4, Exh. A at ¶¶ 17-18, 23, 25.

⁹ D.E. 109-3 at 3 n.2.

1 Defendants' attorneys' fees lacked any consideration from the Individual
2 Defendants and was therefore purely gratuitous.

3 In sum, the relevant passages from *Grand Jury* create a substantive right to
4 relief are inapplicable here. New Jersey substantive law does not apply to this
5 dispute. Rather, California substantive law applies to this dispute. California
6 substantive law does not provide the relief that the Individual Defendants request
7 from this Court. Therefore, this Court must deny the Individual Defendants'
8 Application.

9 **C. Even If The Court Could Exercise Personal Jurisdiction Over**
10 **ATG And New Jersey Substantive Law Was Applicable To This**
11 **Dispute, The Individual Defendants' Summary Action Would Fail**
12 **Under *Grand Jury***

13 At its heart, the Individual Defendants' Application requests that this Court
14 grant temporary and permanent injunctive relief that would force ATG to pay an
15 unspecified amount of attorneys' fees at an unspecified rate for the indeterminate
16 duration of this lawsuit. See D.E. 109-4, Exh. A at 27. Injunctive relief is an
17 "extraordinary remedy, which should be granted only in limited circumstances."
18 *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102 (3d Cir.
19 1988). In deciding whether to grant preliminary injunctive relief, a court must
20 consider (1) whether the requesting party has demonstrated a probability of success
21 on the merits; (2) whether the requesting party will suffer irreparable injury by the
22 denial of the relief; (3) whether granting the requested relief will result in greater
23 harm to the non-requesting party; and (4) whether granting relief will be in the
24 public interest. *Allegheny Energy v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999).
25 When a party seeks a mandatory injunction, an injunction that "alter[s] the status
26 quo by commanding some positive act," the "burden of showing entitlement to the
27 preliminary injunction is greater, as mandatory injunctions are generally
28 disfavored." *Coast to Coast Entm't, LLC v. Coastal Amusements, Inc.*, No. 05-CV-

1 3977, 2005 U.S. Dist. LEXIS 26849, at *26 (D.N.J. Nov. 4, 2005) (citing *United*
2 *States v. Spectro Foods Corp.*, 544 F.2d 1175, 1181 (3d Cir. 1976)). Even
3 assuming *arguendo* that the Court could look past the various determinative issues
4 mentioned above—which it should not—the facts set forth in the Individual
5 Defendants’ filings demonstrate that they cannot meet their burden for mandatory
6 temporary injunctive relief and, therefore, ATG should prevail in a summary action
7 under *Grand Jury*.

8 Here, the Individual Defendants cannot demonstrate a probability of success
9 on the merits in a *Grand Jury* summary action sufficient to meet the high bar
10 required for a mandatory injunction. Individual Defendants have not, and cannot,
11 produce any written agreement by ATG to pay for the Individual Defendants’
12 attorneys’ fees. Indeed, ATG argues that no such unconditional agreement—
13 written or oral—ever occurred. Further, when a third party payer imposes
14 conditions on the payment of another’s legal representation, those conditions must
15 actually be satisfied before *Grand Jury* imposes a continuing obligation to pay. *See*
16 *Levine, Staller, Sklar, Chan, Brown & Donnelly, PA v. Atlantic City*, No. A-0725-
17 12T4, 2015 N.J. Super. Unpub. LEXIS 901, at *48-50 (App. Div. Apr. 21, 2015)
18 (holding that a third party payer had no obligation under *Grand Jury* because the
19 payer “never incurred the unconditional responsibility for the payment of the Firm’s
20 fees undertaken by the corporation in [*Grand Jury*]” and the conditions imposed
21 were not satisfied). The exhibits produced by the Individual Defendants make clear
22 that ATG’s gratuitous payment was always connected with the Individual
23 Defendants’ continued employment with ATG. *See* D.E. 109-4, Exh. 16 (“Mulcahy
24 will have this handled for us, no big deal, we should not be distracted from what we
25 do.”); *id.* Exh. 22 (“[A]s long as you guys are productive, the lawsuit is nothing, we
26 will fight it.”). The Individual Defendants no longer work for ATG, and therefore
27 the condition of payment is no longer satisfied.
28

1 Additionally, ATG's gratuitous arrangement involved paying *Mulcahy* for
 2 the Individual Defendants' representation, not an unknown firm with which ATG
 3 has never dealt. ATG and the Individual Defendants met with Mulcahy and
 4 discussed the specific terms of the retainer agreement and representation. Mulcahy
 5 now seeks to withdraw from representing the Individual Defendants in this case for
 6 unrelated reasons,¹⁰ and the Individual Defendants ask the Court to compel
 7 continued payment to a new firm when ATG has absolutely no idea about the
 8 specifics of payment. ATG does not know the billing rate that will be applied, and
 9 ATG does not have an estimate of how many hours the new firm will spend in
 10 resolving this matter. ATG's gratuitous arrangement was conditioned upon
 11 Mulcahy's continued representation of the Individual Defendants under the terms
 12 they had negotiated; because Mulcahy cannot continue to represent the Individual
 13 Defendants, ATG should not be compelled to pay a firm with which it has never
 14 dealt.

15 For these reasons, Individual Defendants cannot demonstrate the high burden
 16 necessary for the Court to grant mandatory temporary injunctive relief, and
 17 Individual Defendants' Application must be denied. For these same reasons, their
 18 proposed crossclaim would be futile, and the Court should deny leave to amend
 19 altogether.¹¹

21 ¹⁰ See D.E. 105.

22 ¹¹ Even if *Grand Jury* could impose an obligation on ATG to pay for the Individual
 23 Defendants' attorneys' fees, it is undisputed that ATG was concerned that the legal
 24 fees were exceeding their expectations. See D.E. 109-4, Exh. A at 18 (heading
 25 titled "ATG Fires the Employee Defendants Because of the High Cost of Litigation
 26 and Refuses to Meet Its Obligation to Pay Past and Future Legal Fees"). Indeed,
 27 Individual Defendants include in their Application an email from Nick Ni of ATG
 28 to Galleher which states, "I understand [Mulcahy's] bill is bigger than we expected
 and it is be[c]oming a substantial investment on ATG's part, we need to evaluate
 our options before we go on." D.E. 109-4, Exh. 22. Pursuant to the trial court's
 ruling in *Pashman Stein, PC v. Nostrum Labs., Inc.*, No. A-1759-13T1, 2014 N.J.
 Super. Unpub. LEXIS 2496, at *10-19 (App. Div. Oct. 20, 2014), legal fees that
 exceed the third party payer's expectations is sufficient cause for the Court to
 relieve the payer of its obligation.

1 **IV. CONCLUSION**

2 For the reasons discussed herein and upon good cause shown, ATG
3 respectfully request that the Court deny the Individual Defendants' requests that (i)
4 the Court enjoin and restrain ATG from terminating its obligation to pay Individual
5 Defendants' attorneys' fees and (ii) granting leave for Individual Defendants to file
6 a verified crossclaim.

7
8 Dated: October 19, 2015

BRODY AND ASSOCIATES, LLC

9
10 By: /s/ Alexander Friedman
11 ALEXANDER FRIEDMAN
12 Attorneys for Defendant
13 ATG ELECTRONICS, INC.
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